BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONNA CASON	)	
Claimant	)	
	)	
VS.	)	
	)	
BANKS CONSTRUCTION	)	
Respondent	)	Docket Nos. 262,690 & 262,691
	)	
	)	
AND	)	
	)	
KEMPER NATIONAL INSURANCE CO.	)	
	)	
AND	)	
	)	
AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the July 7, 2009 Post-Award Decision by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Steven R. Wilson, of Wichita, Kansas, appeared for the claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Post-Award Decision.

ISSUES

The ALJ denied claimant's request for an Functional Capacity Evaluation (FCE) because he found that K.S.A. 44-510g, a statute that limits respondent's responsibility for vocational assessments, controlled and precluded the sought-after evaluation.

The claimant requests review of this decision. She maintains the authorized treating physician has determined the FCE is appropriate and that it is intended to help "cure and relieve" her of the effects of her injury as provided in K.S.A. 44-510k. Thus, claimant asks the Board to reverse the ALJ's Post-Award Decision.

Respondent argues that the ALJ's decision should be affirmed. Respondent contends the FCE is not necessary, nor is there any evidence that it would improve the claimant's condition. Moreover, under K.S.A. 44-510g employer's have the right to refuse such vocational rehabilitation services.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

The underlying facts surrounding the pending issue are simple. Claimant continues to receive authorized treatment for her compensable injuries pursuant to an Agreed Award issued on November 22, 2002. Claimant now works for a trucking company that purportedly has trucks that are equipped with ergonomic driver's seats. She believes that she is capable of driving those trucks (which would yield higher wages), but that job presently falls outside her restrictions which were rendered as a result of her work-related injuries. Accordingly, claimant went to see the treating physician, Dr. Ng, who agreed that an updated FCE should be performed.

Respondent does not dispute that the treating physician has recommended the FCE. Rather, respondent has refused to provide this FCE arguing it is only obligated to provide medical treatment which is intended to "cure and relieve" the effects of claimant's injuries.[1] Respondent also contends that an FCE is nothing more than a vocational assessment which respondent need only provide voluntarily under K.S.A. 44-510g.

The ALJ denied claimant's request and justified his denial as follows:

> The Court finds that this request is most properly decided under the provisions of K.S.A. 44-510g. The Court finds that essentially the Claimant is requesting the

[1] K.S.A. 44-510k.

> Respondent to pay for a vocational assessment without their [sic] agreement. The statute states in part, that "No vocational assessment, evaluation, services or training shall be provided or made available under the workers compensation act unless specifically agreed to by the employer or insurance carrier."[2]

The Board has considered the parties arguments and finds the ALJ's Post-Award Decision should be reversed and claimant's request for a FCE should be granted.

K.S.A. 44-510h states in pertinent part:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.[3]

K.S.A. 44-510h, as noted above, requires that employers provide such medical treatment as is "reasonably necessary to cure and relieve the employee from the effects of the injury." The case law interpreting this language has consistently found that the statute contemplates the employer being responsible for all treatment which relieves the employee's symptoms, arising from the injury.[4]

In 1993, the legislature reviewed the Kansas Workers Compensation Act (Act) and modified that provision specifically making vocational benefits a voluntary element of workers compensation claims. That statute, K.S.A. 44-510g provides as follows:

> . . . No vocational assessment, evaluation, services or training shall be provided or made available under the workers compensation act unless specifically agreed to by the employer or insurance carrier providing or making available such assessment, evaluation, services or training.

Thus, from that point forward, vocational rehabilitation was merely voluntary and could not be compelled of an employer. But, the first sentence of that same statute declares that "[a]

---

[2] ALJ Post-Award Decision (July 7, 2009) at 2.

[3] The quoted language was inserted in K.S.A. 44-510h when K.S.A. 44-510 was repealed by the 2000 Legislature.

[4] *See Carr v. Unit No. 8169,* 237 Kan. 660, 703 P.2d 751 (1985); *Horn v. Elm Branch Coal Co.*, 141 Kan. 518, 41 P.2d 751 (1935).

primary purpose of the workers compensation act shall be to restore the injured employee to work at a comparable wage."[5]

In this instance, claimant is not seeking a vocational rehabilitation program. Rather, she is seeking an evaluation, termed an FCE, in the hopes of lessening her work restrictions in the further hope of increasing her wages. This is wholly consistent with the intended purpose of the Act. The evaluation she seeks is, in a sense, a form of medical treatment. It is the same procedure that a physician would use in connection with a claim to determine whether and to what extent the claimant had recovered from his or her injury and was capable of returning to the work force. It is also a process that physicians often use in the determination of restrictions, which are necessary both for work and activities away from the workplace. In fact, claimant has had two of these FCE in the past. The only thing that has changed at this juncture of the claim is that claimant has gone on to find work elsewhere and desires to better her employment position and requires another evaluation to (hopefully) relieve herself of some of the burden of her restrictions. The Board does not find that this intended purpose is precluded by the language set forth in K.S.A. 44-510g(a).

It is also worth noting that this evaluation is contemplated by the statutory medical fee schedule.[6] This is further evidence that the evaluation is considered medical treatment.

For these reasons, the Board concludes that the ALJ's Post Award Decision should be reversed and the claimant's request for an FCE should be and is hereby granted.

The Board does not address the issue of attorney's fees as the parties agreed to the $450 fee requested by claimant's counsel for services rendered through July 7, 2009 and that was not at issue in this appeal.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post-Award Decision of Administrative Law Judge Thomas Klein dated July 7, 2009, is reversed and claimant's request for a FCE is hereby granted.

---

[5] K.S.A. 44-510g(a).

[6] KWC Schedule of Medical Fees 2008 at 177 (CPT code 97750 - references a functional capacity evaluation with a written report at $35.36 for 15 minutes)).

IT IS SO ORDERED.

Dated this _____ day of September 2009.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge